No. 75-400

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

MYRON DI NOVO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Myron Di Novo prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction in the United States District Court for the Northern District of Indiana, Hammond Division for violation of 21 U.S.C. Sec. 841(a)(1), possession with intent to distribute narcotics.

REFERENCE TO REPORTS OF OPINIONS

United States v. *Myron Di Novo and Janet Di Novo,* ..... F.2d ..... (Gen. No. 74-1681), not yet reported, is attached as Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 7, 1975. A timely petition for rehearing filed August 4, 1975, was denied on August 13, 1975. Jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether an affidavit for a search warrant that fails to contain factual assertions indicating that narcotics were on the premises can support the issuance of a warrant to search a residence?

CONSTITUTIONAL PROVISION PRESENTED

The Fourth Amendment to the Constitution of the United States.

STATUTES INVOLVED

21 U.S.C., Sec. 841(a)(1).
18 U.S.C., Sec. 4208(a)(2).

RULE

Rule 41—Federal Rules of Criminal Procedure.

STATEMENT OF FACTS

The Search Warrant

On February 1, 1974, United States Magistrate Wilbur J. Glendening in Hammond, Indiana, issued a search warrant for a white house trailer occupying lot number 24, at Sheffield Estates, a trailer court located at 3601 Sheffield Avenue, in Hammond. The warrant authorized a search of the premises at any time of the day or night.

The affidavit in support of the warrant was dated February 1, 1974, sworn to and signed by Agent Chown, recited that he had reason to believe that there were concealed on the premises a quantity of heroin, narcotics, paraphernalia and equipment used for the distribution of heroin and twelve $20 bills and one $10 bill in pre-recorded United States currency.

As reasons supporting these conclusions, Agent Chown's affidavit stated as follows:

A. On February 1, 1974, Chown (affiant) was advised by Agent Richard Lobes, Metropolitan Enforcement Group, Cook County, Illinois, that during the week of January 7, 1974, he (Lobes) had been advised by an unnamed, confidential informant that during the week of January 7, 1974, he (the informant) was in a house located at 226 Highland, Hammond, Indiana, with Myron DiNovo. The informant told Lobes who told Chown that he (the informant) saw two large plastic bags which DiNovo represented to be seven pounds of heroin. The informant further told Lobes who told Chown that DiNovo would have thirty pounds of heroin coming from Mexico.

(No facts were alleged to show how the informant acquired this information—i.e. that DiNovo would have 30 pounds of heroin).

B. The affidavit also recited that Lobes told Chown that this anonymous informant had previously introduced Lobes to a subject who had sold Lobes a quantity of heroin. Lobes further advised Chown that this anonymous informant had previously worked with an Agent Palmer of the Illinois Bureau of Investigation and that Palmer told Lobes (who told Chown) that the informant had given him information which resulted in several arrests and convictions and that Palmer considered him highly reliable.

C. The affidavit also recited that affiant was advised by Lobes that he determined on January 21, 1974, through the Illinois Bell Telephone Company that the phone number at 226 Highland, Indiana, was listed in the name of Myron DiNovo.

D. Chown's affidavit further stated that he had been advised by Agent Lobes that he had been advised by an officer West of the Chicago Police Department that he (West) had been advised by a confidential informant (not identified as the same informant mentioned previously) that one Wayne Wild had told him (the informant) that he (Wild) was a runner for Myron DiNovo and that Wild told the informant (who told West, who told Lobes, who told Chown) that DiNovo would soon have 30 pounds of heroin. (There were no facts stated to show how Wild allegedly acquired this information.)

E. Chown's affidavit also stated that on February 1, 1974 he was advised by Agent Richard Sebuck of the Metropolitan Enforcement Group that on January 21, 1974 Sebuck and other agents followed DiNovo from a trailer on lot 24 on the Sheffield Estate to 159th & Woodridge, where DiNovo met Valarie Wild, who was followed to 15722 Willard, Harvey, Illinois. Agent Sebuck further advised Chown that this address was known to be the residence of Wayne Wild.

F. Chown said he was advised, also on February 1, 1974, by Agent Thomas Ostrowski of the Metropolitan Enforcement Group that on January 21, 1974, he followed DiNovo from 159th and Woodridge to a house trailer lot 24 at Sheffield Estates.

G. Chown also swore that he was advised on February 1, 1974, by Agent Pastrick, Metropolitan Enforcement Group, that on February 1, 1974, a confidential informant who had been supplied with twelve $20 bills and one $10 bill in pre-recorded United States Currency met Valarie Wild at 15722 Willard in Harvey and drove with her to McDonald's parking lot on Sibley Boulevard in Calumet City, where they parked next to a greenish Pontiac occupied by Myron DiNovo. The informant advised Pastrick (who told the affiant, Chown) that the informant gave the money to Valarie Wild who left the car, went over to DiNovo, handed the money to DiNovo and received a foil packet. Valarie Wild then returned to the informant's vehicle and delivered the foil packet to the informant. Pastrick further advised Chown that the informant delivered a packet of brown powder to Pastrick, who conducted a field test on the powder and received a positive indication of opiate content.

Chown's affidavit also stated: "Agent Pastrick further advised me that he personally observed the informant and Valarie Wild enter the parking lot, saw Valarie exit the car, go over to the car occupied by DiNovo, hand money to DiNovo, and receive a foil packet."

H. Chown's affidavit further stated that on February 1, 1974, Agent Thomas Ostrowski of the Metropolitan Enforcement Group advised Chown that he followed the Pontiac driven by DiNovo from McDonald's parking lot to the trailer on lot 24 on Sheffield Estates.

I. Chown also stated that on February 1, 1974, he was advised by Agent Lobes, "that he had determined on January 25, 1974, the telephone listed in the name of Myron DiNovo was listed for the address at 3601 Sheffield, Hammond, Indiana."

J. Chown's affidavit stated that he was advised by Agent Pastrick that on January 25, 1974, he determined from the Northern Indiana Public Service Company that the utilities for lot 24, 3601 Sheffield, Hammond, Indiana, was listed in the name of Myron DiNovo.

K. Chown also stated that a review of the records of the Chicago Police Department indicated that DiNovo had been convicted of importing heroin into the United States and had received a sentence of 5 years probation on July 26, 1972, from the United States District Court for the Northern District of Illinois.

Nowhere in the affidavit was there any reference to Janet DiNovo.

Based upon the foregoing affidavit, the United States Magistrate issued the search warrant. The warrant was executed in the early morning hours of February 2, 1974, and a quantity of brown powder, some foil packets, some syringes, and a quantity of money was seized from the trailer. While the warrant was being executed, other agents arrested Myron and Janet DiNovo.

On February 25, 1974, both Myron DiNovo and Janet DiNovo waived indictment and pleaded not-guilty to a one-count information which charged that on February 2, 1974, both defendants did knowingly and intentionally possess with intent to distribute approximately 40 ounces of a mixture containing heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, U.S.C. Sec. 841(a)(1). (App. "A" p. App. 2).

A motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure to quash the search warrant and suppress the evidence seized was filed on February 25, 1974. The motions of both defendants were denied in a memorandum and order dated March 29, 1974.

On June 4, 1974, the defendant filed a motion to reopen the hearing on the motion to quash the search warrant and suppress evidence on the grounds of material misrepresentations contained in the affidavit supporting the issuance of the warrant.

Paragraph 4C of the affidavit for the search warrant recited that on January 21, 1974 an agent checked with the telephone company and determined that the phone number for the house at 226 Highland, Hammond, Indiana was listed to Myron DiNovo. (App. "B") The records of the telephone company contradicted this factual assertion and the government at the hearing stipulated to the factual in-

accuracy contained in the affidavit for the search warrant. (App. "A" p. App. 4) Following the hearing, the trial court found no material misrepresentation and denied the motion.

The defendants did not testify and both were found guilty by a jury and judgment was entered on the verdict. After post-trial motions were denied, defendant Myron Di Novo was sentenced to the custody of the Attorney General for a term of 25 years and fined $25,000.00 with a special parole term of six years. Janet DiNovo was sentenced to the custody of the Attorney General for a term of 25 years and fined $25,000.00 with a special parole term of six years pursuant to 18 U.S.C. Sec. 4208(a)(2). (App. "A" p. App. 2)

The United States Court of Appeals for the Seventh Circuit affirmed the conviction of Myron DiNovo but reversed the conviction of Janet DiNovo without remand. (App. "A" p. App. 9)

REASON FOR GRANTING THE WRIT

THE SEARCH WARRANT DID NOT ESTABLISH PROBABLE CAUSE TO BELIEVE THAT THERE WERE NARCOTICS ON THE PREMISES FOR WHICH THE WARRANT WAS ISSUED.

The most glaring and fatal defect in the affidavit is failure to state anywhere any facts supporting the conclusion that narcotics could be found on the trailer occupied by Myron DiNovo. There was double and triple hearsay to the effect that Myron DiNovo was a dealer in narcotics and there was the recitation of one controlled sale to an informer in the McDonald's parking lot, but in sharp contrast to those cases where warrants have been upheld, not one of the three informants relied upon in the affidavit supplied any information supporting the conclusion that there were narcotics in the trailer—the place to be searched pursuant to the warrant. Absent some information to the effect that there were narcotics on the premises or that there was a crime being committed on the premises, there was absolutely no basis for issuance of a search warrant for those premises.

The insufficiency of the warrant is immediately apparent when we recall that the agents applied for and relied upon a search warrant for the trailer—not an arrest warrant for defendant, Myron DiNovo. This Court is here called upon to decide not whether there might have been probable cause for the arrest of DiNovo—but whether there was probable cause for the search of a trailer when there was absolutely no factual allegation that there were narcotics in that trailer.

Although three separate informants were relied upon by the government, not one of them gave any information about the trailer or the location of Myron DiNovo's narcotics. Not one of them had ever purchased narcotics from DiNovo. None of them had ever been inside his trailer and seen the narcotics. None of them could refer to a conversation in which he said where his narcotics were or even that he had any narcotics for sale. Nor was there any mention of narcotic addicts or dealers coming to and from the trailer.

The Court has repeatedly held search warrants invalid where they fail to set forth underlying circumstances sufficient to support the conclusion that the items to be seized are located where affiant says they are located. In *Nathanson* v. *United States,* 290 U.S. 41 (1933), where an affidavit alleged that the affiant had cause to suspect and did believe that certain merchandise was at a specified location, the Court held that the affidavit was not sufficient because it was based upon a ". . . mere affirmation of suspicion and belief without any statement of adequate supporting facts." (290 U.S. 41, 79 L.Ed. 159, 162) To the same effect is *Giordenello* v. *United States,* 357 U.S. 480 (1958).

And in *Aguilar* v. *Texas,* 378 U.S. 108 (1964), the Court again held that an affidavit must set forth the underlying circumstances. Relying on *Nathanson* and *Giordenello,* the Court observed that the affidavit contained no allegation that affiant spoke with personal knowledge of the matters alleged therein and did not even contain the allegation that affiant's source spoke with personal knowledge. The Court went on to reaffirm the *Jones* principle that the magistrate must be informed of "some of the underlying circumstances from which the informant concluded that the narcotics

were where he claimed they were." (378 U.S. 108, 114) To the same effect is *Spinelli* v. *United States,* 393 U.S. 410 (1969).

Contrast the facts of this case with the information relied upon in those cases where warrants have been upheld.

In *Jones* v. *United States,* 362 U.S. 257 (1960), the informant supplied information that petitioner and another kept a ready supply of heroin on hand in the apartment and "claimed to have purchased narcotics *at the apartment* from petitioner 'on many occasions', the last of which was the day before the warrant was applied for." (emphasis supplied) (362 U.S. 257, 268) In *Jones* the Court held that the facts were sufficient to allow the magistrate "to conclude that narcotics were probably present in the apartment. . . ." (362 U.S. 257, 271)

Similarly in *Rugendorf* v. *United States,* 376 U.S. 528, 11 L.Ed. 2d 887 (1964), the search warrant for the basement of a residence was predicated upon the informant's statement that he ". . . saw the furs in petitioner's basement. . . ." (376 U.S. 528, 532). There was no claim here that anyone saw narcotics in defendant's trailer.

And in *United States* v. *Harris,* 403 U.S. 573 (1971), the affidavit in an illegal whiskey case stated that the informant had personal knowledge and had purchased illicit whisky *from the resident described in the warrant.* There was no such allegation of purchase on the premises to be searched in this case.

The insufficiency of the facts relied upon by the agents here is further underscored by contrasting these facts with the facts of numerous cases where the informant personally purchased narcotics from defendant on the premises to

be searched or actually saw narcotics on the premises to be searched. (E.g. *Jones* v. *United States,* 362 U.S. 257).

In the instant case, although there was police surveillance of the trailer for some time prior to issuance of the warrant, there were no drug peddlers or users seen going into the trailer. A reading of the affidavit in light of the foregoing principles shows that the facts do not even begin to provide probable cause to believe there were narcotics in the trailer. None of the informants here ever claimed that there were narcotics in the trailer. *No one* claimed to have any personal knowledge of what was in the trailer and none of the persons referred to in the affidavit had any knowledge of what was in the trailer. There is not even any hearsay information as to what was in the trailer. Nor was there any surveillance of known drug users or peddlers entering the trailer or lurking in the neighborhood. The conclusion of the affiant that there were narcotics in the trailer is mere speculation.

The first informant referred to in the affidavit allegedly on January 7, 1974, personally observed two large bags which DiNovo represented to contain heroin in a house located at 226 Highland, Hammond, Indiana—*but not in the trailer.* Although the informant's personal observations may have provided probable cause for search of the house on Highland, they did not and could not provide probable cause for search of the trailer.

The second informant allegedly told the agent that one Wayne Wild told him he was a runner for DiNovo and that DiNovo would soon have 30 pounds of heroin. There is, of course, nothing stated as to how Wild allegedly acquired this information, but more importantly there is no information supplied at all by his informant concerning narcotics in the trailer.

The third informant allegedly participated through another party in a purchase of heroin from defendant—but again supplied no information as to any heroin in the trailer or at any other location.

The Fourth Amendment requires that a search warrant be supported by an affidavit setting forth facts supporting the conclusion that the items to be seized are located on the premises to be searched. The affidavit in this case does not comply with this requirement.

The court below recognized that there were no factual assertions in the affidavit that directly indicated that narcotics or narcotics paraphernalia were being kept at the premises to be searched, but affirmed petitioner's conviction upon the premise that there were factual assertions in the affidavit which dissipated the critical nature of the problem. (App. "A" p. App. 5) The court held that it was proper to conclude that petitioner had been living at 226 Highland and kept his supply of heroin there, and that when the affidavit was filed he was no longer living at 226 Highland but in the trailer.

The basis for the court's conclusion finds its roots in expanded interpretation given to the assertion contained in the affidavit that Myron Di Novo was observed by an informant in a house at 226 Highland on January 7th in which narcotics were present, and that as of January 21, 1974 the telephone number for the house at 226 Highland was listed in his name. (App. "A" p. App. 4)

As a result of this interpretation, the court arrived at the conclusion of prior residence by petitioner at 226 Highland and framed the issue as, "whether there was probable cause to assume that a drug seller who had previously kept drugs in his former residence and was seen

returning to his current residence after making a drug sale was still storing narcotics in his residence." (App. 'A" pp. App. 5-6)

The petitioner suggests that the factual assertions relied upon by the court below as a predicate for the conclusion of prior residence which in turn is the basis for the court upholding the search of a subsequent residence finds no support in the affidavit. Mere presence in a house three weeks prior does not, without more, establish an inference of residence. Paragraph 4A of the affidavit states the facts asserted:

> "A. That on February 1, 1974, your affiant was advised by Agent Richard Lobes, Metropolitan Enforcement Group, Cook County, Illinois, that during the week of January 7, 1974, a confidential informant advised Agent Lobes that the informant was in a house at 226 Highland, Hammond, Indiana, with Myron DiNovo that week and observed two large plastic bags containing brown powder which DiNovo represented to be seven pounds of heroin. The informant further advised that DiNovo would have thirty pounds of heroin coming in from Mexico;"

A close reading of paragraph 4-A fails to show any fact or circumstance from which residency could be inferred. The informant did not refer to the premises as DiNovo's house, although, if that were the case, it certainly would seem more likely a description. There are no facts that indicate that he was a tenant or an occupant of the premises, or that he exercised control of the place. Even the seven pounds of heroin are not described as belonging to DiNovo, and finally, the factual assertion that additional heroin would be forthcoming is not attributed to DiNovo, or for that matter to anyone.

That leads to a consideration of the second factual assertion contained in the warrant from which the Court concluded that appellant had been living at 226 Highland Avenue, the telephone listing. The evidence adduced at the hearing on June 11, 1974 clearly established that there was no telephone number listed in the name of Myron DiNovo at 226 Highland Avenue, Hammond, Indiana. The government expressly stipulated to the factual inaccuracy contained in the affidavit for the search warrant.

Absent the element of prior residency previously discussed, we are left with the problem, "that there are no factual assertions in the affidavit that directly indicate that narcotics or narcotics paraphernalia were being kept at the premises to be searched."

The two cases cited by the Court as standing for the proposition that the mere fact that an individual is selling drugs and has possession of a large quantity of drugs someplace is sufficient probable cause to search his residence are clearly distinguishable from the instant case.

In *Chin Kay* v. *United States,* 311 F.2d 317 (9th Cir. 1962) the affidavit contained factual assertions from three informants that the defendant kept narcotics at home and his place of business.

In the case of *United States* v. *Klopholz,* 17 F.R.D. 18 (S.D.N.Y. 1955) it was because of defendant's own admissions that a search warrant for a safety deposit box was upheld.

We respectfully suggest that *United States* v. *Flanagan,* 423 F.2d 745 (5th Cir. 1970) is more appropriate to the circumstances in the instant case. In *Flanagan,* cited by the court in the opinion, the Court there stated:

> "The statement, even if reliable, that a named person who is known felon has committed a burglary, plus possession by the subject of some of the proceeds when arrested, does not without more authorize the issuance of a search warrant to search the residence of accused miles away. Citing *United States* v. *Whitlow,* 339 F.2d 975 (7th Cir. 1964); *Gillespie* v. *United States,* 368 F.2d 1 (8th Cir. 1966)."

The factual assertions described as dissipating the critical nature of the problem fail to justify the factual conclusion upon which the ultimate holding is based. The critical problem is still very much in evidence. Something more than the anemic inferences contained in the affidavit should be required to fulfill the constitutional requirement for showing probable cause to search a residence.

CONCLUSION

From the above and foregoing premise, petitioner prays that your Honors will consider his complaints to be of sufficient constitutional magnitude to warrant this Court's review on writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

74-1681
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MYRON DiNOVO and JANET DiNOVO,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division
No. H CR 74-19, ALLEN SHARP, *Judge.*

ARGUED FEBRUARY 26, 1975—DECIDED JULY 7, 1975

Before SWYGERT and TONE, *Circuit Judges,* and PERRY, *Senior District Judge.**

SWYGERT, *Circuit Judge.* The principal issues in this case concern the adequacy of an affidavit by a federal agent to establish probable cause for the issuance of a search warrant; the sufficiency of the evidence with respect to defendant-appellant Janet DiNovo; and the sufficiency of the evidence with respect to the defendants' intent to distribute the drugs found in their home.

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* Senior District Judge Joseph Sam Perry of the United States District Court for the Northern District of Illinois is sitting by designation.

Defendants-appellants Myron DiNovo and Janet DiNovo were convicted after a jury trial of possession with intent to distribute a mixture containing heroin in violation of 21 U.S.C. § 841(a)(1). Myron DiNovo was sentenced to a term of twenty-five years imprisonment and a special parole term of six years. In addition he was fined $25,000. Janet DiNovo was sentenced to a term of twenty-five years imprisonment pursuant to 18 U.S.C. §4208(a)(2).

On February 1, 1974 various police officers, including agents of the Drug Enforcement Administration traveled to a house trailer located on Trailer Lot 24, 3601 Sheffield, Hammond, Indiana to execute a federal search warrant. Upon arriving the narcotics officers placed the residence under surveillance. Myron DiNovo was observed leaving the trailer and getting into a white Pontiac automobile which he drove across the street and parked alongside the trailer. Janet DiNovo then left the trailer and got into this car. An agent pulled up behind the white car, got out of his automobile and announced to the defendants that he was a police officer, whereupon the defendants' car sped away. After the automobile avoided a different police car and another announced police officer, a high speed chase took place. Eventually the defendants' car slowed down and the defendants were arrested. Janet DiNovo was identified as having been the passenger in the car.

Pursuant to the search warrant the Lot 24 house trailer was searched. In the middle drawer of a bedroom dresser an agent found a paper bag in which there were thirty-nine prophylactics containing approximately two pounds of 7.5 percent pure heroin. In the living room the agents found a briefcase which had fourteen thousand dollars in currency and a brown paper bag containing nine foil packets of heroin. Also in the living room on top of a

coffee table were found seven hypodermic syringes, six of which contained heroin, a few empty packets of tinfoil, and an open tinfoil packet that contained heroin. Finally agents found in the bedroom closet two scales, one of which was accurate to twenty-eight hundredths of an ounce and was of the type used for rapid weighing.

I.

Both defendants challenge the constitutionality of the issuance of the search warrant. First they contend that the affidavit in support of the warrant contained multiple hearsay which did not meet the requirements of *Aguilar* v. *Texas,* 378 U.S. 108 (1964). We have included the affidavit as an appendix to this opinion. We find no problem with the hearsay statements of the informant in paragraph 4-A. An affidavit for a search warrant can properly include hearsay based on hearsay provided it contains information "relating to (1) the reliability of the informant and (2) some knowledge of the underlying facts to support the conclusion that a crime had been committed." *United States* v. *Carmichael,* 489 F.2d 983, 986 (7th Cir. 1973). Sufficient underlying facts are set forth and the informant's reliability is adequately shown in paragraph 4-B. The reliability of the crucial information contained in paragraph 4-G was established by the personal observations of agent Pastrick also contained in that paragraph. Finally there is the question of the reliability of the informant referred to in paragraph 4-D. It could be argued that the statement is a declaration against penal interest and thus an exception to the hearsay rule. We do not decide this issue since, as is evident from our later discussion, we do not believe this informant's statement need be considered to find sufficient probable cause.

Defendants also contend that the warrant was invalid because it was based on an affidavit in which there were

material misrepresentations of fact. A full hearing was held on this issue in the district court pursuant to *United States* v. *Carmichael.* It was stipulated that the information in paragraph 4-C was incorrect. Although defendants contend that this was an intentional misrepresentation, the district court found that that agent had not even acted recklessly in regard to the matter and this finding is not clearly erroneous. Therefore there was no basis for suppression under *Carmichael.* Defendants also claim that agent Pastrick's statement in paragraph 4-G was a misrepresentation of what was actually observed. The district court questioned the credibility of Valerie Wild who gave contradictory testimony. Based on the testimony of agent Pastrick we accept the lower court's finding of no misrepresentation.

Finally defendants attack the affidavit on the ground that it was insufficient to show probable cause to search the trailer. In view of our previous discussion, we are confronted with evaluating the question of probable cause on the basis of the following facts: During the week of January 7, 1974 two large plastic bags containing a brown powder were observed in a house at 226 Highland, Hammond, Indiana and Myron DiNovo represented that they contained seven pounds of heroin; as of January 21, 1974 the telephone number for the house at 226 Highland, Hammond, Indiana was listed in the name of Myron Di Novo; this house was vacated shortly after that date; on January 21, 1974 Myron DiNovo was observed leaving and returning to a house trailer on Lot No. 24 at Sheffield Estates, 3601 Sheffield Avenue, Hammond, Indiana; on February 1, 1974 Myron DiNovo drove from a parking lot where he had just delivered a foil packet of opiate content and received $250 to the house trailer on Lot 24, Sheffield Estates; as of January 25, 1974 the telephone

listed in the name of Myron DiNovo was listed for the address at 3601 Sheffield; as of January 25, 1974 the utilities for Lot 24, 3601 Sheffield were listed in the name of Myron DiNovo; as of January, 1974 Myron DiNovo was to receive thirty pounds of heroin; Myron DiNovo had previously been convicted of importing heroin into the United States. The question is whether these facts support a search warrant for the Lot No. 24 trailer.

A problem arises because there are no factual assertions in the affidavit that directly indicate that narcotics or narcotics paraphernalia were being kept at the premises to be searched. There was probable cause to assume that Myron DiNovo was "dealing" in narcotics and had control of heroin someplace. The affidavit was also sufficient to allow the conclusion that this trailer was Myron DiNovo's residence. But there was still the difficult question of whether the mere fact that an individual is selling drugs and has possession of a large quantity of drugs someplace is sufficient probable cause to search his residence. One court has apparently determined that under such circumstances there is probable cause. *Chin Kay* v. *United States,* 311 F.2d 317 (9th Cir. 1962); *cf. United States* v. *Klopholz,* 17 F.R.D. 18 (S.D. N.Y. 1955). *But cf. United States* v. *Flanagan,* 423 F.2d 745 (5th Cir. 1970). In the instant case there are factual assertions in the affidavit which dissipate the critical nature of the problem. From the affidavit it was proper to conclude that Myron DiNovo had been living at 226 Highland and had kept his supply of heroin there. Also there was a basis to believe that when the affidavit was filed Myron DiNovo was no longer living at 226 Highland but instead was living in the trailer on Lot No. 24 in Sheffield Estates. Thus the issue becomes whether

there was probable cause to assume that a drug seller who had previously kept drugs in his former residence and was seen returning to his current residence after making a drug sale was still storing narcotics in his residence. We think these additional facts and inferences constituted sufficient probable cause and hold that the warrant was properly issued.

II.

Defendant-appellant Janet DiNovo contends that the evidence was insufficient to prove her knowing possession of the heroin. The Government's case is based on the theory of constructive possession, which "means being in a position to exercise dominion or control over a thing." *United States* v. *Holland,* 445 F.2d 701, 703 (D.C. Cir. 1971). "Such dominion and control need not be exclusive but may be shared with others." *United States* v. *Davis,* 461 F.2d 1026, 1035 (3d Cir. 1972). Still, "mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession." *Arellanes* v. *United States,* 302 F.2d 603, 606 (9th Cir. 1962) (footnotes omitted). Our task, which admittedly is somewhat subjective, is to apply these general propositions to the facts in this case view in the light most favorable to the Government and determine whether constructive possession by Janet DiNovo was proved.

The relevant evidence in regard to Janet DiNovo is minimal. She was present when the down payment of $100 was made on the trailer, but Myron and his brother returned alone and paid the $3,200 balance. A January rent payment for Lot No. 24 was made by Myron DiNovo

and the electric service on the trailer had been applied for by Myron DiNovo. Janet DiNovo was seen leaving the trailer on January 29, 1974 at approximately 8:50 p.m., whereupon she drove to a residence in Hammond, remained about an hour, drove to a supermarket, bought a few items, and then returned to the trailer. On February 1, 1974 she also was seen leaving the trailer and getting into the car driven by Myron DiNovo that was later involved in the high speed chase. Finally two different witnesses did refer to Janet as Myron's wife.

The Government argues that this amount of evidence is sufficient to prove that Janet DiNovo was in a position to exercise dominion and control over the heroin found in the trailer. It is important to note that, unlike *United States* v. *Davis,* 461 F.2d 1026 (3d Cir. 1972) (relied upon by the Government) Janet DiNovo was not discovered in the immediate area of unconcealed narcotics. Thus her constructive possession must be justified on the basis of her possessory interest in the trailer. There was no evidence to show that she owned the trailer. At best the evidence showed that she was married to Myron DiNovo and lived in the trailer with him. Under the circumstances of this case we think that merely being Myron's wife is not the kind of "special relationship" justifying a finding of constructive possession speculated upon in *United States* v. *Holland,* 445 F.2d 701, 703 (D.C. Cir. 1971). Even if she knew that Myron had possession of this heroin, this does not mean she possessed it. The Government offered no evidence of what type of clothing was in the dresser in which the heroin was found. Nor do we know what was in the portion of the closet where the scales were found. There is no evidence from which to deduce that the heroin was in a part of the trailer which was under the control

of Janet DiNovo. Finally, unlike Myron DiNovo who drove the fleeing car, Janet DiNovo's presence as a passenger in the car before and during the time it was involved in the chase cannot be deemed an admission of guilt since she did nothing to facilitate the flight. We therefore hold that the evidence is insufficient to support the guilty verdict returned against Janet DiNovo.

III

An insufficiency of the evidence issue is also raised in regard to the question of proof of intent to distribute.* We think the circumstantial evidence was more than sufficient to support this element of the crime.

In the first place the heroin was discovered in prophylactics which are often used for distribution; $14,000 bound in $1000 packets was also found. Most important was the discovery of the scales, one of which was a rapid weighing scale accurate to twenty-eight hundredths of an ounce. Finally there was testimony that the "street" value of this heroin would range from $80,000 to $240,000 depending upon the method and dosage level of distribution. The introduction of this evidence was objected to on the basis that it was irrelevant and highly inflammatory. On appeal it is claimed that the evidence was so prejudicial that the failure to exclude it constitutes reversible error. We do not agree. Testimony as to value was relevant and admissible on the question of intent to distribute. *United States* v. *Wilkerson*, 478 F.2d 813, 815 (8th Cir. 1973). Any "prejudice" was due only to the fact of the amount of heroin possessed which was the very subject of the crime charged.

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* In view of part II of this opinion we are only considering this issue as it relates to Myron DiNovo.

Given the quantity of the heroin possessed, its potential value and the other discovered items, especially the scales, we hold that the jury could have properly concluded that the heroin was being possessed for sale purposes rather than personal use.

The judgment of conviction of Myron DiNovo is affirmed. The judgment of conviction of Janet DiNovo is reversed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

UNITED STATES OF AMERICA,

vs.

A WHITE HOUSE TRAILER BEARING A RED, WHITE AND BLUE INSIGNIA WITH THE WORD "SCHULT" ON ITS FRONT END WITH A CANOPY OVER THE SIDE ENTRANCEWAY, OCCUPYING LOT NO. 24 AT SHEFFIELD ESTATES, 3601 SHEFFIELD AVENUE, HAMMOND, INDIANA.

Magistrate's Docket No.
Case No. 74-11M

AFFIDAVIT FOR SEARCH WARRANT

Before WILBUR J. GLENDENING, *United States Magistrate,* 49 Muenich Court, Hammond, Indiana, the undersigned being duly sworn, deposes and says:

1. That he is employed as a Special Agent of the Drug Enforcement Administration, and has been so employed by the Drug Enforcement Administration and its predecessor, the Bureau of Narcotics and Dangerous Drugs, for approximately four and one-half years, and that he has been assigned to and participated in investigations involving violations of Federal law during that time prohibiting the sale of dangerous drugs, Title 21, United States Code, Section 801, et seq.;

2. That based on said investigation, more particularly described hereinafter, your affiant has cause to believe and does believe that there is being concealed a quantity of heroin in the premises described as a white house trailer bearing a red, white and blue insignia with the word "Schult" on its front end with a canopy over the side entranceway, occupying lot No. 24 at Sheffield Estates, 3601 Sheffield Avenue, Hammond, Indiana, and that there is being concealed narcotics paraphernalia and equipment used for distribution of heroin, and twelve $20 bills and one $10 bill in pre-recorded United States currency;

3. That your affiant is making this affidavit for the purpose of securing a search warrant in order that a legal search of the above-described premises may be made at any time of the night or day, and that a quantity of heroin which is being maintained for the purpose of distribution, and narcotics paraphernalia and equipment used for distribution of heroin, and money which was the fruits of narcotics sales, in violation of Section 841(a)(1) of Title 21 United States Code, found therein, may be seized and dealt with according to law;

4. That the reason that your affiant has reason to believe and does believe that the above-described contraband evidence and fruits are being concealed in the above-described premises are as follows:

A. That on February 1, 1974, your affiant was advised by Agent Richard Lobes, Metropolitan Enforcement Group, Cook County, Illinois, that during the week of January 7, 1974, a confidential informant advised Agent Lobes that the informant was in a house at 226 Highland, Hammond, Indiana, with Myron DiNovo that week and

observed two large plastic bags containing brown powder which DiNovo represented to be seven pounds of heroin. The informant further advised that DiNovo would have thirty pounds of heroin coming in from Mexico;

B. That your affiant was further advised by Agent Lobes that on a prior occasion this informant introduced Agent Lobes to a subject who sold Agent Lobes a quantity of heroin. Agent Lobes further advised your affiant that the informant previously worked with Agent Palmer of the Illinois Bureau of Investigation who represented to Lobes that the informant had given information resulting in several arrests and convictions and that Palmer considered him highly reliable;

C. That your affiant was further advised by Agent Lobes that he determined on January 21, 1974, through Northern Illinois Bell Telephone Company that the telephone number for the house at 226 Highland, Hammond, Indiana, was listed in the name of Myron DiNovo; but that investigation revealed that this address was vacated shortly after that date.

D. That on February 1, 1974, your affiant was further advised by Agent Lobes that on January 20, 1974, Agent Lobes was advised by Officer West, Chicago Police Department, Gang Intelligence Unit, that a confidential informant had advised West that the informant was told by Wayne Wild that Wild was a runner for Myron DiNovo and that Wild told the informant that DiNovo would soon have thirty pounds of heroin;

E. That on February 1, 1974, your affiant was advised by Agent Richard Sebock, Metropolitan Enforcement Group, that on January 21, 1974, Agent Sebock and other Agents followed Myron DiNovo from the house

trailer on Lot No. 24 at Sheffield Estates, 3601 Sheffield Avenue, Hammond, Indiana, to 159th and Woodridge, Harvey, Illinois, where he met Valerie Wild. Valerie Wild was followed to 15722 Willard, Harvey, Illinois, first floor apartment. Agent Sebock further advised your affiant that this apartment was known to be the residence of Wayne Wild;

F. That your affiant was advised on February 1, 1974, by Agent Thomas Ostrowski, Metropolitan Enforcement Group, that on January 21, 1974, he followed Myron DiNovo from 159th and Woodridge, Harvey, Illinois, to the house trailer on Lot No. 24 at Sheffield Estates, 3601 Sheffield Avenue, Hammond, Indiana;

G. That on February 1, 1974, your affiant was advised by Agent Patrick Pastrick, Metropolitan Enforcement Group, Cook County, Illinois, that on February 1, 1974, a confidential informant who had been supplied twelve $20 bills and one $10 bill in pre-recorded United States Currency met Valerie Wild at 15722 Willard, Harvey, Illinois, and drove with Valerie Wild to McDonald's parking Lot on Sibley Boulevard in Calumet City, Illinois, where they parked their vehicle next to a greenish Pontiac occupied by Myron DiNovo. The informant advised Agent Pastrick that informant had given the twelve $20 bills and one $10 bill to Valerie Wild who exited the car, went over to DiNovo, handed DiNovo the money, and received a foil packet. Valerie Wild returned to informant's vehicle, delivered the foil packet to the informant. Agent Pastrick further advised that the informant delivered a foil packet of brown powder to Agent Pastrick and Agent Pastrick conducted a Marquis test on the powder and received a positive indication of opiate content. Agent Pastrick further advised that he personal-

ly observed the informant and Valerie Wild enter the parking lot, saw Valerei Wild exit the car, go over to the car occupied by DiNovo, hand money to DiNovo, and receive a foil packet;

H. That on February 1, 1974, your affiant was advised by Agent Thomas Ostrowski that he followed the greenish Pontiac driven by DiNovo from the McDonald's parking lot to the house trailer on Lot No. 24 at Sheffield Estates, 3601 Sheffield Avenue, Hammond, Indiana;

I. That on February 1, 1974, your affiant was advised by Agent Lobes that he determined on January 25, 1974, the telephone listed in the name of Myron DiNovo was listed for the address at 3601 Sheffield, Hammond, Indiana;

J. That on February 1, 1974, your affiant was advised by Agent Pastrick that on January 25, 1974, he determined from Northern Indiana Public Service Company that the utilities for Lot No. 24, 3601 Sheffield, Hammond, Indiana, was listed in the name of Myron DiNovo;

K. That a review of the records for the Chicago Police Department, Chicago, Illinois, indicated that Myron DiNovo was convicted of importing heroin into the United States in United States District Court for the Northern District of Illinois and sentenced to five years probation on July 26, 1972.

Wherefore, your affiant requests that a search warrant be issued to any Special Agent of the Drug Enforcement Administration authorizing him to conduct a search of the above-described premises, known as Lot No. 24,

Sheffield Estates, 3601 Sheffield Avenue, Hammond, Indiana, at any time of the night or day, and to search said premises and to take into possession all such things as previously described and found in or on such premises.

/s/ Thomas H. Chown

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Thomas H. Chown
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this 1st day of February, 1974.

/s/ Wilbur J. Glendening

.....

Wilbur J. Glendening
United States Magistrate
Northern District of Indiana

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 13, 1975

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. JOSEPH SAM PERRY, Sr. District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1681 vs.

MYRON DiNOVO and JANET DiNOVO,

Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
(No. H CR 74 19)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

No. 75-400

In the Supreme Court of the United States

OCTOBER TERM, 1975

MYRON DI NOVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-400

MYRON DI NOVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of possessing, with the intent to distribute, about two-and-a-half pounds of a mixture containing heroin, in violation of 21 U.S.C. 841(a) (1). He was sentenced to 25 years' imprisonment, to be followed by 6 years' special parole; petitioner was also fined $25,000. The court of appeals affirmed (Pet. App. A).[1]

The undisputed evidence showed that federal narcotics agents searched petitioner's house-trailer pursuant to a warrant. Among petitioner's belongings, the agents found approximately two-and-a-half pounds of a mixture containing heroin, about $14,000 in cash, two scales, and other narcotics paraphernalia (Pet. App. A 2-3). The "street" value of the heroin was between $80,000 and $240,000, depending upon how it was packaged for sale (Tr. 240-241).

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[1]The court of appeals reversed the conviction of Janet Di Novo, petitioner's wife, because it found the evidence against her to be insufficient (Pet. App. A 6-8).

1. Petitioner contends that the search warrant affidavit was insufficient to establish probable cause that evidence would be found in his house-trailer. This contention was correctly rejected by the court of appeals after a careful review (Pet. App. A 3-6).

The affidavit, appended to the court of appeals' opinion (Pet. App. B 10-15), was sworn before a United States Magistrate by Agent Thomas H. Chown of the Drug Enforcement Administration ("DEA"). In his affidavit, Agent Chown relied primarily upon information supplied by named local police officers who were then cooperating with the DEA agents.[2] The affidavit was executed on February 1, 1974, and stated the following facts:

(a) that about three weeks earlier, a reliable informant had been in a house at 226 Highland St. with petitioner; that while there, the informant saw two bags which petitioner said contained heroin; that the informant said petitioner would have 30 pounds of heroin coming in from Mexico (Pet. App. B 11-12, para. 4A); that this informant had previously given assistance to a local officer in making an undercover purchase of narcotics and had given another local officer information resulting in several arrests and convictions (Pet. App. B 12, para. 4B);

(b) that ten days earlier the telephone company stated that a telephone at the Highland Street address was listed to petitioner, but that police investigation revealed petitioner had vacated the address shortly after that date (Pet. App. B 12, para. 4C);

(c) that eleven days earlier, a second informant had said that Wayne Wild admitted being a runner for petitioner and that Wild told the informant that petitioner would soon have 30 pounds of heroin (Pet. App. B 13, para. 4D);

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[2]The information supplied by the local police was a reliable basis for Agent Chown's affidavit. *United States* v. *Ventresca*, 380 U.S. 102, 111; *United States* v. *Luna*, No. 75-1084, C.A.6, decided November 7, 1975; *United States* v. *Stratton*, 453 F.2d 36, 37-38 (C.A. 8), certiorari denied, 405 U.S. 1069.

(d) that ten days earlier named local police officers had followed petitioner from a house-trailer at 3601 Sheffield Avenue, Lot No. 24, to a certain location where he met Valerie Wild; that Valerie Wild was followed to the residence of Wayne Wild; that petitioner was then followed back to the house-trailer (Pet. App. B 12-13, paras. 4E, 4F);

(e) that on the same day the affidavit was executed, a named local police officer observed a meeting between an informant and Valerie Wild at which he gave her twelve $20 bills and one $10 bill, the serial numbers of which had been recorded, and the officer saw her give money to petitioner in exchange for a package of narcotics; that Valerie Wild gave the package of narcotics to the informant, who turned it over to the local police officer (Pet. App. B 13-14, para. G); that a named police officer followed petitioner as he drove from this transaction to the house-trailer on Sheffield Ave (Pet. App. B 14, para. H);

(f) that the telephone number at the house-trailer on Sheffield Ave, Lot 24, was listed to petitioner (Pet. App. B 14, para. 4I);

(g) that the utilities for the house-trailer on Sheffield Ave, Lot 24, were listed in petitioner's name (Pet. App. B 14, para. 4J); and

(h) that petitioner had previously been convicted for importing heroin into the United States and had been sentenced to 5 years' probation (Pet. App. B 14, para. 4K).

Based on the foregoing information, the magistrate authorized a search of petitioner's house-trailer for "narcotics, narcotics paraphernalia, and twelve $20 bills and one $10 bill in United States currency * * *" (petitioner's court of appeals brief, p. 1a).

2. The affidavit was adequate to support the search warrant. There was sufficient information from which the magistrate could conclude that petitioner was dealing in

narcotics from the house-trailer. The affidavit established a connection between the house-trailer and one apparent and one actual narcotics' transaction: first, when petitioner left the trailer to meet with Valerie Wild, who then returned to the residence of Wayne Wild, petitioner's runner; second, when petitioner returned to the house-trailer after selling drugs to the informant. Furthermore, as the court of appeals held (Pet.App. A 5-6), the affidavit indicated that petitioner had kept his supply of narcotics at his former residence, and the magistrate was therefore justified in concluding that petitioner would also keep his narcotics at his new residence, the house-trailer.

Petitioner points out (Pet. 15) that paragraph 4C of the affidavit (Pet. App. B 12) was factually inaccurate, namely, there had been no telephone listed to petitioner at the Highland Street address. The local officer testified that a telephone operator had told him petitioner had a telephone at the Highland Street address (Tr., Proceedings Had on Motions, p. 88), and the district court found that this was, at most, an innocent mistake (*id.*, at p. 169; see also Pet. App. A 4). Since the local officer obtained his information from the telephone company, the affiant was certainly justified in believing a telephone was listed at that address to petitioner, and the magistrate could properly consider it in making his determination of probable cause.[3]

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[3]One other paragraph of the affidavit deserves comment. As noted above, paragraph 4D (Pet. App. B 12) contained a second informant's statement that Wayne Wild said that he was petitioner's runner and that petitioner was expecting a delivery of 30 pounds of heroin. However, the affidavit did not establish "underlying circumstances from which the officer concluded that [this] informant * * * was 'credible' or his information 'reliable'." *Aguilar* v. *Texas*, 378 U.S. 108, 114. Therefore, before this paragraph can properly be considered as contributing to probable cause, it must be determined whether other allegations in the affidavit corroborate this informant's information and therefore make it reliable. *Spinelli* v. *United States*, 393 U.S. 410, 415.

The informant's statements are corroborated: his statement about petitioner's expected receipt of 30 pounds of heroin is corroborated by the identical information supplied by another informant, whose reliability was set out in the affidavit (Pet. App. B 11-12, paras. 4A, 4B). His statement that Wayne Wild was a runner for petitioner is corroborated by the statement that local police personally observed Valerie Wild return to Wayne Wild's residence after a meeting with petitioner (Pet. App. B 12-13, para. 4E), and by the later sale of narcotics by petitioner to a cooperating individual, with Valerie Wild acting as an intermediary (Pet. App. B 13-14, paras. 4G, 4H). Therefore, this information may properly be considered as contributing to probable cause. Cf. *United States* v. *Harris*, 403 U.S. 573. However, as the court of appeals held (Pet. App. A 3), there was sufficient information aside from this paragraph (para. 4D) to establish probable cause to search petitioner's house-trailer.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.